

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
STATESBORO DIVISION**

JIMMY LEE JONES,

Plaintiff,

v.

FNU LEWIS; FNU GAY; FNU DAVIS;  
AMBER ANDERSON; and FNU CLERK,

Defendant.

CIVIL ACTION NO.: 6:15-cv-109

**ORDER and MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Plaintiff filed this action while an inmate at Rogers State Prison in Reidsville, Georgia, pursuant to 42 U.S.C. § 1983. In his Complaint, Plaintiff contested certain conditions of his confinement while he was housed at the Appling County Jail in Baxley, Georgia.

A prisoner proceeding in a civil action against officers or employees of government entities must comply with the mandates of the Prison Litigation Reform Act (“PLRA”), 28 U.S.C. § 1915. After review, the Court **VACATES** its September 30, 2015 Order, (doc. 4), and **DENIES** Plaintiff’s Motions to Proceed *In Forma Pauperis*. (Docs. 2, 3.) **I RECOMMEND** that the Court **DISMISS** Plaintiff’s Complaint, without prejudice, pursuant to 28 U.S.C. § 1915(g) and for Plaintiff’s blatant disregard and abuse of the judicial process.<sup>1</sup> I further **RECOMMEND** that the Court **DENY** Plaintiff *in forma pauperis* status on appeal.

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<sup>1</sup> A “district court can only dismiss an action on its own motion as long as the procedure employed is fair. . . To employ fair procedure, a district court must generally provide the plaintiff with notice of its intent to dismiss or an opportunity to respond.” Tazoe v. Airbus S.A.S., 631 F.3d 1321, 1336 (11th Cir. 2011) (citations and internal quotations marks omitted). A Magistrate Judge’s Report and Recommendation (“R&R”) provides such notice and opportunity to respond. See Shivers v. Int’l Bhd. of Elec. Workers Local Union, 349, 262 F. App’x 121, 125, 127 (11th Cir. 2008) (indicating that a party has notice of a district court’s intent to sua sponte grant summary judgment where a magistrate judge issues a report

## PLAINTIFF'S ALLEGATIONS

Plaintiff filed this Complaint against several prison officials on September 14, 2015. (Doc. 1.) In his Complaint, Plaintiff asserted that he had been denied adequate medical care while housed at the Jail. (Id. at pp. 5, 6–14.) Specifically, Plaintiff states that the prison has a policy of delaying dental care to inmates. He contends that a nurse, Defendant Anderson, made the determination of when prisoners needed to see a dentist rather than a qualified dentist. Id. As a result of this policy, Plaintiff contends that he lost a tooth that could have been saved by receiving a timely filling. Plaintiff seeks monetary relief to remedy this deficient medical care. Id.

The form that Plaintiff used to file his Complaint asked, “[w]hile incarcerated or detained in any facility, have you brought any lawsuits in federal court which deal with facts other than those involved in this action?” (Id. at p. 2.) Plaintiff responded that he had not filed any such actions and answered “N-A” to every other question regarding prior lawsuits.

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recommending the sua sponte granting of summary judgment); Anderson v. Dunbar Armored, Inc., 678 F. Supp. 2d 1280, 1296 (N.D. Ga. 2009) (noting that R&R served as notice that claims would be sua sponte dismissed). This Report and Recommendation constitutes fair notice to Plaintiff that his suit is barred and due to be dismissed. As indicated below, Plaintiff will have the opportunity to present his objections to this finding, and the District Court will review de novo properly submitted objections. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; see also Glover v. Williams, No. 1:12-CV-3562-TWT-JFK, 2012 WL 5930633, at \*1 (N.D. Ga. Oct. 18, 2012) (explaining that magistrate judge’s report and recommendation constituted adequate notice and petitioner’s opportunity to file objections provided a reasonable opportunity to respond).

## DISCUSSION

### I. Section 1915(g)<sup>2</sup>

28 U.S.C. § 1915(g) of the PLRA provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). Furthermore, dismissals for providing false filing-history information and failing to comply with court orders both fall under the category of “abuse of the judicial process,” which the Eleventh Circuit has held to be a “strike-worthy” form of dismissal under § 1915(g). See Rivera v. Allin, 144 F.3d 719, 723 (11th Cir. 1998); Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1544 (11th Cir. 1993) (characterizing failure to comply with court orders as “abuse of the judicial process”). Section 1915(g) “requires frequent filer prisoners to prepay the entire filing fee before federal courts may consider their lawsuits and appeals.” Rivera, 144 F.3d at 731. The Eleventh Circuit upheld the constitutionality of Section 1915(g) in Rivera. In so doing, the Court concluded that Section 1915(g) does not violate an inmate’s rights to access to the courts, to due process of law, or to equal protection, or the doctrine of separation of powers. Rivera, 144 F.3d at 721–27.

A review of Plaintiff’s history of filings reveals that he has brought at least three civil actions or appeals which were dismissed and count as strikes under Section 1915(g): See R. & R., Jones v. Lane et al., No. 1:12-cv-3774 (N.D. Ga. Nov. 7, 2012), ECF No. 3 (recommending dismissal of Plaintiff’s complaint under Section 1915(g) and citing three prior dismissals that

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<sup>2</sup> It appears that Plaintiff may have been released since the filing of this lawsuit. (Docs. 7, 8.) However, the PLRA applies to his claims because he was incarcerated at the time he filed this action. Harris v. Garner, 216 F.3d 970, 976 (11th Cir. 2000).

qualify under Section 1915(g)). Because Plaintiff has filed at least three previously dismissed cases or appeals which qualify as strikes under Section 1915(g), Plaintiff may not proceed *in forma pauperis* in this action unless he can demonstrate that he meets the “imminent danger of serious physical injury” exception to Section 1915(g).

“In order to come within the imminent danger exception, the Eleventh Circuit requires ‘specific allegations of present imminent danger that may result in serious physical harm.’” Odum v. Bryan Cty. Judicial Circuit, No. CV407-181, 2008 WL 766661, at \*1 (S.D. Ga. Mar. 20, 2008) (quoting Skillern v. Jackson, No. CV606-49, 2006 WL 1687752, at \*2 (S.D. Ga. June 14, 2006) (citing Brown v. Johnson, 387 F.3d 1344, 1349 (11th Cir. 2004))). General and conclusory allegations not grounded in specific facts indicating that injury is imminent cannot invoke the Section 1915(g) exception. Margiotti v. Nichols, No. CV306-113, 2006 WL 1174350, at \*2 (N.D. Fla. May 2, 2006). “Additionally, ‘it is clear that a prisoner cannot create the imminent danger so as to escape the three strikes provision of the PLRA.’” Ball v. Allen, No. 06-0496, 2007 WL 484547, at \*2 (S.D. Ala. Feb. 8, 2007) (citing Muhammad v. McDonough, No. CV306-527-J-32, 2006 WL 1640128, at \*1 (M.D. Fla. June 9, 2006)).

Plaintiff should not be excused from prepaying the filing fee because of the imminent danger of serious physical injury. His Complaint did not allege any current dental issue, and he does not seek any injunctive relief. While Plaintiff alleges past injury, that is not sufficient to meet the imminent danger exception. Therefore, Section 1915(g) bars him from proceeding *in forma pauperis* in this case. Should Plaintiff choose to prosecute these claims while incarcerated, he must bring a separate action and pay the full filing fee.

## **II. Dismissal for Abuse of Judicial Process**

In his Complaint, Plaintiff indicates that he has not previously initiated any lawsuits in while incarcerated or detained. (Doc. 1, p. 2.) The form Complaint directly asks Plaintiff about his prior lawsuits. Plaintiff affirmatively answered that he did not have any, and he then indicated that several other questions regarding prior lawsuits were not applicable. (*Id.* at pp. 2–3.) However, the case management system shows that Plaintiff has brought several lawsuits while he was incarcerated or detained, including two prior cases in this Court: Jones v. Clarence D. Blount, Sr., No. 5:12-cv-138 (S.D. Ga. Nov. 29, 2012) ; and Jones v. Cavender, 6:11-cv-46 (S.D. Ga. May 9, 2011).

As previously stated, Section 1915 requires a court to dismiss a prisoner’s action if, at any time, the court determines that it is frivolous or malicious, fails to state a claim, or seeks relief from an immune defendant. 28 U.S.C. § 1915(e)(2)(B). Significantly, “[a] finding that the plaintiff engaged in bad faith litigiousness or manipulative tactics warrants dismissal” under Section 1915. Redmon v. Lake Cty. Sheriff’s Office, 414 F. App’x 221, 225 (11th Cir. 2011) (alteration in original) (quoting Attwood v. Singletary, 105 F.3d 610, 613 (11th Cir. 1997)). In addition, Federal Rule of Civil Procedure 11(c) permits a court to impose sanctions, including dismissal, for “knowingly fil[ing] a pleading that contains false contentions.” *Id.* at 225–26 (citing Fed. R. Civ. P. 11(c)). Again, although pro se pleadings are to be construed liberally, “a plaintiff’s pro se status will not excuse mistakes regarding procedural rules.” *Id.* at 226.

Relying on this authority, the Court of Appeals for the Eleventh Circuit has consistently upheld the dismissal of cases where a pro se prisoner plaintiff has failed to disclose his previous lawsuits as required on the face of the Section 1983 complaint form. See, e.g., Redmon, 414 F. App’x at 226 (pro se prisoner’s nondisclosure of prior litigation in Section 1983 complaint

amounted to abuse of judicial process resulting in sanction of dismissal); Shelton v. Rohrs, 406 F. App'x 340, 341 (11th Cir. 2010) (same); Young v. Sec'y Fla. for Dep't of Corr., 380 F. App'x 939, 941 (11th Cir. 2010) (same); Hood v. Tompkins, 197 F. App'x 818, 819 (11th Cir. 2006) (same). Even where the prisoner has later provided an explanation for his lack of candor, the Court has generally rejected the proffered reason as unpersuasive. See, e.g., Redmon, 414 F. App'x at 226 (“The district court did not abuse its discretion in concluding that Plaintiff’s explanation for his failure to disclose the Colorado lawsuit—that he misunderstood the form—did not excuse the misrepresentation and that dismissal was a proper sanction.”); Shelton, 406 F. App'x at 341 (“Even if [the plaintiff] did not have access to his materials, he would have known that he filed multiple previous lawsuits.”); Young, 380 F. App'x at 941 (finding that not having documents concerning prior litigation and not being able to pay for copies of same did not absolve prisoner plaintiff “of the requirement of disclosing, at a minimum, all of the information that was known to him”); Hood, 197 F. App'x at 819 (“The objections were considered, but the district court was correct to conclude that to allow [the plaintiff] to then acknowledge what he should have disclosed earlier would serve to overlook his abuse of the judicial process.”).

Another district court in this Circuit recently explained the importance of this information as follows:

[t]he inquiry concerning a prisoner’s prior lawsuits is not a matter of idle curiosity, nor is it an effort to raise meaningless obstacles to a prisoner’s access to the courts. Rather, the existence of prior litigation initiated by a prisoner is required in order for the Court to apply 28 U.S.C. § 1915(g) (the “three strikes rule” applicable to prisoners proceeding in forma pauperis). Additionally, it has been the Court’s experience that a significant number of prisoner filings raise claims or issues that have already been decided adversely to the prisoner in prior litigation. . . . Identification of prior litigation frequently enables the Court to dispose of successive cases without further expenditure of finite judicial resources.

Brown v. Saintavil, No. 2:14-CV-599-FTM-29, 2014 WL 5780180, at \*3 (M.D. Fla. Nov. 5, 2014) (emphasis omitted).

As Plaintiff filed several prior lawsuits while detained, he blatantly misrepresented his litigation history in his Complaint. The plain language of the complaint form is clear—asking whether Plaintiff has filed any lawsuit in federal court while incarcerated or detained. (Doc. 1, p. 2.) Thus, regardless of the outcome of Plaintiff’s prior lawsuits, his initiation of those lawsuits is the precise type of activity for which this prompt requires disclosure. Plaintiff failed to fully disclose—and, in fact, affirmatively denied—the existence of a prior lawsuit, which constitutes a complete lack of candor that will not be tolerated in this Court.

Consequently, the Court should also **DISMISS** this action for Plaintiff’s failure to truthfully disclose his litigation history as required.

### **III. Leave to Appeal *In Forma Pauperis***

The Court should also deny Plaintiff leave to appeal *in forma pauperis*.<sup>3</sup> Though Plaintiff has, of course, not yet filed a notice of appeal, it would be appropriate to address these issues in the Court’s order of dismissal. Fed. R. App. P. 24(a)(3) (trial court may certify that appeal is not taken in good faith “before or after the notice of appeal is filed”).

An appeal cannot be taken *in forma pauperis* if the trial court certifies that the appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3). Good faith in this context must be judged by an objective standard. Busch v. Cty. of Volusia, 189 F.R.D. 687, 691 (M.D. Fla. 1999). A party does not proceed in good faith when he seeks to advance a frivolous claim or argument. See Coppededge v. United States, 369 U.S. 438, 445 (1962). A claim or argument is frivolous when it appears the factual allegations are clearly baseless or the legal theories are indisputably meritless. Neitzke v. Williams, 490 U.S. 319, 327 (1989); Carroll v.

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<sup>3</sup> A certificate of appealability is not required in this Section 1983 action.

Gross, 984 F.2d 392, 393 (11th Cir. 1993). Or, stated another way, an *in forma pauperis* action is frivolous and, thus, not brought in good faith, if it is “without arguable merit either in law or fact.” Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002); see also Brown v. United States, Nos. 407CV085, 403CR001, 2009 WL 307872, at \*1–2 (S.D. Ga. Feb. 9, 2009).

Based on the above analysis of Plaintiff’s action, there are no non-frivolous issues to raise on appeal, and an appeal would not be taken in good faith. Moreover, as a “three striker” Plaintiff is not only barred from filing a civil action *in forma pauperis*, he is also barred from filing an appeal *in forma pauperis* while he is a prisoner. Thus, the Court should deny him *in forma pauperis* status on appeal.

#### CONCLUSION

The Court **VACATES** the Order dated September 24, 2015, (doc. 3), and **DENIES** Plaintiff’s Motions to Proceed *In Forma Pauperis*, (docs 2, 3). I also **RECOMMEND** that Court **DISMISS** Plaintiff’s Complaint, without prejudice, and **DENY** Plaintiff leave to appeal *in forma pauperis*.

The Court **ORDERS** any party seeking to object to this Report and Recommendation to file specific written objections within fourteen (14) days of the date on which this Report and Recommendation is entered. Any objections asserting that the Magistrate Judge failed to address any contention raised in the Complaint must also be included. Failure to do so will bar any later challenge or review of the factual findings or legal conclusions of the Magistrate Judge. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140 (1985). A copy of the objections must be served upon all other parties to the action. The filing of objections is not a proper vehicle through which to make new allegations or present additional evidence.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge will make a *de novo* determination of those portions of the report to which objection are made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the Magistrate Judge. Objections not meeting the specificity requirement set out above will not be considered by a District Judge. The Clerk of Court is **DIRECTED** to serve a copy of this Report and Recommendation upon Plaintiff.

**SO ORDERED and REPORTED and RECOMMENDED**, this 12th day of January, 2016.



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R. STAN BAKER  
UNITED STATES MAGISTRATE JUDGE  
SOUTHERN DISTRICT OF GEORGIA